

a

KUMARAN C RAMAN

v.

RADAKRISHNAN CK RAMAN

b

HIGH COURT MALAYA, JOHOR BAHRU
 ABDUL KADIR MUSA J
 [CIVIL SUIT NO: 22-154 OF 1997]
 30 APRIL 1999

c

CIVIL PROCEDURE: *Striking out - Striking out statement of claim - Order 18 r. 19(1) Rules of the High Court 1980 - Grounds of application - Reliance on different limbs under r. 19(1) - Whether must be clear and unambiguous - Rules of the High Court 1980 O. 18 rr. 19(1)(a),(b),(d), 19(2), 19(3)*

d

CIVIL PROCEDURE: *Affidavits - Supporting affidavit - Defects - Absence of jurat in Form 78 - Omission to indorse and serve within prescribed time - Whether affidavit liable to be rejected - Whether application to strike out claim must fail - Rules of the High Court 1980 O. 18 rr. 19(1)(a), (b) & (d), O. 32 rr. 2(2), 3, 13(1) & (2)(a), O. 41 rr. 1(7) & (8), 9(2)*

e

The defendant had filed a summons-in-chambers application to strike out the plaintiff's statement of claim under 'O.18' Rules of the High Court 1980 ('Encl. 19'). In so alluding to O.18 Rules of the High Court 1980 ('the 1980 Rules'), however, Encl.19 had described that Order as "Aturan 19(a)" and not "Aturan 19(1)(a)" or "Aturan 18 kaedah 19(1)(a)" as it should have. The facts also showed that, as for the grounds of the application, Encl. 19 did not make it clear whether it was relying solely on r. 19(1)(a) or r. 19(1)(b) or a combination of r. 19(1)(b) and r. 19(1)(d). The defendant had also filed an affidavit in support of Encl. 19 ('Encl. 18'), but Encl. 18, apparently, had not been served on the plaintiff within the statutory time period allocated for the purpose. Encl. 18, further, had not been indorsed nor dated, and was without a properly completed jurat in one of the Forms in Form 78. In this appeal to the Judge in Chambers against the dismissal of Encl. 19 by the learned Senior Assistant Registrar ('SAR'), a question arose as to whether the said SAR's decision ought to be affirmed, bearing in mind that no attempt was made by the defendant to correct or perfect the flaws aforesaid.

*f**g**h***Held:***i*

[1] Rule 19(1) of O. 18 of the 1980 Rules provides two sets of procedure, namely (i) procedure based solely on paragraph (1)(a) thereof; and (ii) procedure based on either one or more of the ground or grounds laid down in paragraphs (b) to (d).

- [1a] It follows that if procedure (i) aforesaid is to be adopted, then sub-rule 2 of rule 19 must be complied with. And should the applicant decide to rely on procedure (ii) above, then sub-rule (3) of rule 19 must be observed. a
- [2] An application under O. 18 r. 19(1) of the 1980 Rules must be certain and not vague, especially so when an application under the ground provided under r. 19(1)(a) must be read together with r. 19(2) ie. that the court can only consider the pleadings, and not the evidence, to decide such application. It cannot be denied, however, that, upon the pleadings, there are a number of real issues which can only be determined by the trial proper. On this score alone this appeal ought to be struck out. b
c
- [2a] The aforesaid apart, bearing in mind O. 18 of the 1980 Rules, there is clearly no “Kaedah 19(a)” as adverted to in Encl. 19, but only “rule 19(1)(a)”. The defendant should at least make an oral application to the court to have it corrected in accordance with O. 32 r. 2(2) of the 1980 Rules. This, however, was not done. Further, by using the words “**dan/atau**” in ground (i) of Encl. 19, and not the word “atau”, the defendant was clearly not sure whether to rely on para 19(1)(a) only, or para 19(1)(b) or a combination of paras 19(1)b and 19(1)(d). d
- [3] Assuming that the defendant was relying on either para 19(1)(b) or para 19(1)(d), or both, the court may of course consider affidavit evidence in consonance with O. 41 of the 1980 Rules. The facts showed however, that the defendant did not categorically state whose affidavit he was relying on and this made Encl. 19 defective *ab initio*. This aside, Encl. 18 was full of defects and that made Encl. 19 irregular and liable to be struck out. By not indorsing the affidavit, and not completing the jurat in the prescribed form, the defendant had contravened r. 1(7) & (8) and r. 9(2) of O. 41 of the 1980 Rules. e
f
- [3a] The defendant had also not complied with the requirements of O. 13 rr. 1, 3, 13(2)(a) of the 1980 Rules in the matter of service of Encl. 18 and the summons. Without Encl. 18, the grounds specified in paragraphs (i) to (iii) of Encl. 19 are only bare allegation of facts and are insufficient to warrant a summary judgment to be entered. g
- [4] Under O. 2 (1) of the 1980 Rules the non-compliance herein are mere irregularity and the defendant could therefore still invoke O. 41 r. 4 of the 1980 Rules to cure them. There was however no such leave applied for by the defendant. Encl 18 therefore remains defective and cannot be used to support Encl 19 under O. 32 r. 13(1) of the 1980 Rules. Summary judgment was hence rightly refused by the learned SAR. h
i

- a** [5] An application under O. 18 r. 19(1) ought to be made promptly. On the facts, Encl. 19 was not filed promptly and was certainly filed after the proper case has been set for trial. This, coupled with a defective Encl 18, left the court with no alternative but to affirm the SAR's order and struck out the appeal.

b [Appeal struck out. Order of SAR affirmed]

Case(s) referred to:

AG of Duchy of Lancaster v. L & NW Rly [1892] 3 Ch 274

Asiah bt Abdul Manap and Anor v. Capital Insurance Bhd [1998] 4 CLJ 257

- c** *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7

Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman & Ors [1987] 1 CLJ 572

Daimler Company Ltd v. Continental Tyre And Rubber Company (Great Britain) Ltd 1916 2 AC 307 HL

- d** *Jamir Hassan v. Kang Min* [1991] 3 CLJ 2490

New Straits Times (Malaysian) Bhd v. Kumpulan Kertas Niaga Bhd & Anor [1985] 1 MLJ 226

Oh Thevesa v. Sia Hok Chai [1992] 1 CLJ 170

Pembinaan Nadzri Sdn Bhd v. Koon Hoe & Co Sdn Bhd [1996] 2 CLJ 1039

Pertamina v. Kartika Ratna Thahir & Ors [1983] 1 MLJ 136

- e** *Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678

Tucker v. Collinson [1886] 34 WR 354

Legislation referred to:

Rules of the High Court 1980, O. 2(1), O. 18, rr. 19(1)(a), (b), (c), (d), (2), 19(1)(a), (b), (d), (2), (3), O. 25, O. 32, rr. 1, 2(2), 8(3), 13(1), (13)(2)(a), (b), (15), O. 41. rr (1), 1(7), (8), 9(2), 18, 19

- f**

For the defendant - Zulkifli; M/s L Parthiban & Assoc

For the plaintiff - Marie R Cocheril; M/s Rozinah Nizaruddin, S Gunapati & Co

Reported by WA Shariff

g

JUDGMENT

Abdul Kadir Musa J:

- h** A suit was filed by the plaintiff, Kumaran s/o CK Raman on 26 June 1997 against his younger brother, Radakrishnan s/o CK Raman ('the defendant'). It was for a claim of half of the amount of the compensation paid to the defendant consequential to the government's acquisition of a piece of land under Malay Land Grant No. 765, Lot 305, Johor Bahru Town ('the said land'). The amount so paid was RM843,159.20; and this was not disputed by
- i** the defendant.

In retrospect, the original registered owner to the said land was the father of both the plaintiff and defendant. On the said land there was then a wooden family house. The said land was, on 7 March 1968, transferred by him to both of them in equal shares. a

As the aforesaid wooden house was an old one, sometime in 1976, the father expressed his intention to replace the said wooden house to a brick one. Since the defendant was a government officer, and in view of applying for the government loan, the half share to the said land of the plaintiff was caused to be effectively transferred to the defendant on 5 May 1977 after Form 14 A was duly executed on 2 April 1977. Unfortunately, before their father could harvest the fruit of his wish, he passed away sometime in October 1977. b
c

Be that as it may, the defendant proceeded to build a brick house on the said land as a mark of respect to the wish of their deceased father by taking a Government loan and charging the said land to the government. The house was duly completed, whereby the certificate of fitness was issued on 24 April 1979. Thereafter all the members of the family moved in to the said house, including both plaintiff and defendant. d

About three years later, by Government Gazette GN 323 dated 12 March 1992, the said land was acquired by the government. Consequential to the said acquisition, sometime in 1994, the defendant was paid a compensation of RM843,159.20 by the government. e

As a result of the said acquisition of the said land with the aforesaid brick house thereon, the defendant, by letter dated 4 May 1994 sent a BBMB cheque No. 982639 of even date for a sum of RM100,000 to the plaintiff. It was given, according to the plaintiff at para. 25 of his statement of claim (“encl. (2)”) as the first part of his share and the defendant will be giving the balance later. His claim for half share of the compensation so given to the defendant was based on the alleged “tacit understanding” that the defendant was holding on trust the plaintiff’s said half undivided share for and on behalf of the plaintiff (para. (8), encl. (2)). f
g

The defendant on the other hand, denied, at para. (13) of his statement of defence (“encl. (6)”) filed on 18 September 1997, that there has ever been in existence of such a “tacit understanding” as alleged by the plaintiff. Instead, he averred at para. (24) of the encl. (6) that, the aforesaid RM100,000 was given by him to the plaintiff on the ground of “love and affection” as his elder brother. The plaintiff refused to accept the said sum and returned the aforesaid cheque to the defendant; hence this suit. h

i

- a* On those brief facts of the suit proper, there is therefore a clear dispute that can only be resolved by way of actual trial and not otherwise. It was perhaps due to that reason that must have led the plaintiff to file in Summons for Directions under O. 25 of the Rules of The High Court 1980 (“the 1980 Rules”), whereby, on 15 December 1997, it was ordered that the suit (encl. (2)) was to be fixed for trial within 120 days from that date (“encl. (16)”).

Flowing from encl. (16), a notice of mention to fix the hearing date for the suit was issued by the High Court Registry on 23 January 1998. It was fixed to 5 June 1998:

- c* However, instead of obtaining the hearing date or dates of the suit on 5 June 1998 as scheduled, the defendant filed in a Summons-in-Chamber (“encl. (19)”) to have the plaintiff’s statement of claim struck out under O. 18 of the 1980 Rules. Encl. (19) was filed on 14 April 1998; at the 11th hour of the expiry of the direction as per encl. (16) and before the 5 June 1998.
- d* As a follow up to the filing of encl. (19), the Learned Deputy Registrar fixed 22 June 1998 as the hearing date of the encl. (19) application before the Learned Senior Assistant Registrar (“the Learned SAR”), and I was officially informed of the same on 5 June 1998. Upon the request of both parties, I agreed to re-schedule the fixing of the hearing date or dates of encl. (2) to 23 June 1998 in order to enable encl. (19) application to be heard accordingly by the Learned SAR.

- e* However, by the letter dated 15 June 1998 (“encl. (24)”), the court was informed that the defendant’s counsel handing the encl. (19) application had to be in the Court of Appeal at Kuala Lumpur on 22 June 1998 for another Civil Appeal Case *vide* J-08-106-96. As such, they requested the hearing of the encl. (19) application be postponed to another date. On 22 June 1998, in view of encl. (24), again the Learned Deputy Registrar, in allowing the aforesaid request, re-fixed the hearing of the encl. (19) application to 29 June 1998, but the mention date of 23 June 1998 remained undisturbed.

- f* On 23 June 1998, for the same reason as stated above, I again had to re-schedule the fixing of the hearing date or dates to 30 June 1998. From the record, the Learned SAR did hear the encl. (19) application on 29 June 1998 as fixed, but deferred his decision to 7 July 1998. In view of that, and upon the request of both parties, I again put off the hearing date or dates of encl. (2) to 21 July 1998 when the suit was brought up for mention before me on 30 June 1998.

- g* On 7 July 1998, the Learned SAR dismissed the encl. (19) application. Against that decision, the defendant filed his Notice of Appeal to the Judge in Chambers on 8 July 1998 (“encl. (27)”). I was officially informed of this on 21 July 1998.

On 21 July 1998, I then fixed the hearing of encl. (27) on 11 September 1998 and the hearing of encl. (2) suit to 1 March 1999. **a**

On 11 September 1998, the parties requested a short adjournment of the hearing of encl. (27) to enable them to take further instruction(s) from their respective clients; if need be, to try to resolve the matter. In view of that, I allowed their request and postponed the hearing of encl. (27) to the 17 September 1998 for mention. **b**

On 17 September 1998, they informed me that their clients would like encl. (27) to be heard. As such, I fixed it to 31 December 1998. Unfortunately, it was again put off to 10 February 1999 on the ground that one of the counsels had a part-heard case (22-243-95). **c**

On 10 February 1999, I pointed out to learned counsel for the defendant to a number of defects in respect of the defendant's encl. (19) application which, in all probabilities, were not brought to the attention to the learned SAR when the said application was heard before him. I also explained to him the importance of the different limbs of O. 18 of the 1980 Rules. Both the learned counsels understood and appreciated my explanation. Due to those pointing out and explaining, both counsels requested another short adjournment to enable them to get further and final instruction(s) from their respective clients. In all fairness to them, I obliged their request and postponed the hearing of encl. (27) to 26 February 1999. **d**
e

On 26 February 1999, I was informed by Encik Zulkiflee, learned counsel for the defendant, that his client has instructed him to proceed with the appeal (encl. (27)) in relation to encl. (19) application inspite of the fact that the hearing of encl. (2) (ie, the suit proper) was scheduled to be heard on 1 March 1999. Since I have already pointed out and explained quite in detail of the defects glaringly printed in encl. (19), it was and is my most considered opinion that it would not be necessary for them to submit to me respect of encl. (27) in order to save the court's time. For the reasons explained below, I have no alternative but to struck off the appeal with no order as to costs since there was no submission required by me from both the learned counsels. In order to give the necessary opportunity to the defendant's counsel to take further instruction(s) from his client consequential to my striking off encl. (27), I then fixed the encl. (2) hearing originally scheduled to be heard on 1 March 1999 to 12 April 1999 for mention. 1 March 1999 hearing date was therefore vacated. **f**
g
h

On 12 April 1999, I was informed by Encik Zulkiflee that his client has instructed him to file the Notice of Appeal ("encl. (X)") on 18 March 1999 against my said decision. As such, he requested for an adjournment of the hearing of encl. (2) until the outcome of the said appeal. I obliged him and postponed it to 16 June 1999 for mention to determine what would be the **i**

a most appropriate action(s) to be taken therefrom. That being such, I will next endeavour to give my reasons as to why I struck off the defendant's appeal *vide* encl. (27).

b Under O. 18 r. 19(1) of the 1980 Rules, any pleading or indorsement may be struck out at any stage on ground or grounds provided by paras. (a) to (d) of the aforesaid rule. For convenience, permit me to quote the aforesaid rule which provides as follows:

c 19.(1) The Court may at any stage of the proceeding order to be struck out or amended any pleading ..., of any writ in the action, or anything in any pleading ..., on the ground that -

- d*
- (a) it discloses no reasonable cause of action or defence, as the case may be; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the Court;
- and may order the action to be stayed or dismissed ...

(2) No evidence shall be admissible on an application under para. (1)(a).

e (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

(Emphasis, underlined).

f From the above, I am of a considered opinion that r. 19(1) provides two sets of procedures. They are:

- (1). Procedure based solely on para. (1)(a); and
- (2). Procedure based on either one or more of the ground or grounds laid down in para. (b) to (d).

g It follows therefore that, if procedure (1) is to be adopted, then sub-r. (2) of r. (19) must be complied with. Should the applicant decide to rely on procedure (2) above, then sub-r. (3) of r. (19) must be observed. Having said that, I will now have to examine encl. (19) itself.

h Examination of encl. (19) crystally clear shows the following:

SAMAN DALAM KAMAR

BENARKAN ...

i 1. Membatalkan tuntutan Plaintiff di bawah Aturan 19(a) Kaedah-kaedah Mahkamah Tinggi 1980 atas alasan-alasan bahawa:-

- i. ia tidak mendedahkan apa-apa kausa tindakan; dan/atau
- ii. ia mengaibkan, remeh dan atau menyusahkan;
- iii. ia selainnya adalah suatu penyalahgunaan proses Mahkamah;
- 2. Kos...
- 3. ...

(Emphasis, underlined).

From that a number of flaws could be seen clearly as demonstrated below.

Firstly, encl. (19) speaks of "... Aturan 18 Kaedah 19(a)" There is no " ... Kaedah 19(a) ..." under r. 19(1) of the 1980 Rules, but "r. 19(1)(a)". I take it there was a typing error to that. If that was so, then there should be at least an oral application made to the court to have it corrected accordingly O. 32 r. 2(2) of the 1980 Rules. The said O. 32 r. 2(2) states:

2. (1)...

(2) A summons may not be amended after issue [in accordance with paragraph (1) above] without the leave of the Court.

I would, in all probabilities, granted the required leave and amended it accordingly if there was such an application; unfortunately, there was none, either formally or orally.

Secondly, under ground (i) of encl. (19), the reason for the application was obviously under r. 19(1)(a). It also contains the words "dan/atau" after the word " ... kausa tindakan.", which, in my opinion should have only be "atau" to reflect the word "or" provided by r. (19)(1)(a). With respect, by using the words "dan/atau" (ie, "and/or") convinced me that the defendant was not sure whether to rely on para. (1)(a) only or any or combination of ground (ii) (which is provided under para. (1)(b) of r. (19)) and ground (iii) (as provided by para. (1)(d), *ibid.*) of encl. (19). In my view, application under O. 18 r. 19(1) must be certain and not vague. This is more so since application on the ground provided under r. 19(1)(a) of O. 18 of the 1980 Rules must be read together with r. 19(2), *ibid.* It must therefore be based only on the pleadings and nothing else. If that was so, in the instant case, the court can only look into the Statement of Claim (encl. (2)) and the Statement of Defence (encl. (6)). Looking closely to both of them, it was and is clear in my view that there were and are a number of real disputes which can only be determined by the trial proper. Without the benefit of the Learned SAR's ground and if that was his reason for dismissing the defendant's encl. (19)'s application, then I would fully agree with him. On that score alone, I have no hesitation to strike out encl. (27) appeal by the defendant.

- a* Notwithstanding the above, assuming that the defendant was relying on either para. (1)(b) or para. (1)(d) or both of the aforesaid r. (19), it will become more obvious that sub-r. (2) of the aforesaid r. (19) cannot be invoked. In such a situation, evidence is allowed. That evidence is affidavit evidence, which with O. 41 of the 1980 Rules. By that, the defendant must therefore state categorically whose affidavit he was relying on. That was not done in respect of encl. (19) application, which, in my considered view, again made encl. (19) defective *ab initio*.

- c* Further examination of the encl. (19) application, also revealed that the relevant affidavit in support to encl. (19) application is encl. (18); the affidavit of the defendant himself. That being so, and as pointed out earlier, O. 41 of the 1980 Rules must be complied with. In that context, r. 9(2) and r. (1) sub-rr. (7) and (8) of the said O. 41 must be adhered to.

Order 41, rule 9 (2) provides as follows:

- d* 9.(1) ..
(2) Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.
(Emphasis, underlined).
- e* Rule (1) sub-r. (7) and (8) provide further the following:
1. (7) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.
- (8) A jurat must be in one of the forms in Form 78.
- f* (Emphasis, underlined).

- g* From the above it is very apparent that, both the aforesaid rules the word “must” was incorporated thereto. It follows therefore that, all that are required to be complied with must be satisfied. Any omission of any of such fundamental requirements will render any affidavit intended to be used as supporting evidence to any application by way of Summons-in-Chambers defective, unless and until it is cured by way of amendment with leave of the court.

- h* The word “must” can be found in a number of rules of O. 32 of the 1980 Rules. It can be found in O. 32 r. 1, whereby it is required that all “ ... application in Chambers must by Summons in Form 62.” In r. (3) of the said Order, it is provided that such a Summons “ ... must be served on every other party not less than two clear days before the day so specified.” The word “must” is also used in rr. 8(3), 13(1), (13)(2)(a) and (b) and (15) of the same Order.
- i*

The word “must” found in r. 13(2)(a) aforesaid was interpreted by Mr Justice Abdul Kadir Sulaiman in the case of *Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678 to mean as “absolute obligation”. I fully agree with him. The said rule provide as follows:

(2). Save as otherwise provided by these rules -

(a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and

(b) ...

(Emphasis, underlined),

which mandatorily requiring such affidavit must be filed and served on the opposite party within 14 days from the date of filing the necessary application. Failure to do so, exposes the said application to be struck out.

Applying the parellel reasoning to both rr. 1(7) and (8) and 9 of O. 41 of the 1980 Rules, it must therefore follow that, the presence of the word “must” in the aforesaid rules should likewise be interpreted in the like manner and having the same effect as that given to the word “must” found it r. 13(2)(a) aforesaid. Thus failure on the part of the defendant to subscribe to the mandatory requirements of the aforesaid rules rendered encl. (18) to be defective. Without encl. (18), the grounds specified in paras. (i) to (iii) of encl. (19) without more can safely be construed as bare allegation of facts insufficient to warrant a summary judgment to be entered.

However, since O. 2(1) of the 1980 Rules provides that such non-compliance should be treated as an irregularity and not a nullity, the defendant could still circumvent the above situation by invoking O. 41 r. 4 of the same Rules. The said r. 4 provides:

4. An affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

(Emphasis, underlined).

Unfortunately, there was no such leave ever been applied for by the defendant or granted by the court in respect encl. (19) application. That being so, encl. (18) remains to be defective and cannot therefore be used to support encl. (19) application under O. 32 r. 13(1) of the 1980 Rules. There was neither jurat “... in one of the forms in Form 78 (rule (1) and (8) of O. 41, of the 1980 Rules) nor was encl. (18) indorsed and dated (rule 9(2), *ibid.*). With respect, I must stress here again that the 1980 Rules are not mere rules of practice as they are subsidiary legislations which have statutory force and must therefore be strictly complied with (please see *Pembinaan Nadzri Sdn Bhd v.*

- a* Koon Hoe & Co Sdn Bhd [1996] 2 AMR 2618, at 2619, under “Held 2(a)”. Thus, unless and until (please see para. 220 vol. 37, HLB 4th. edn.). Encl. (18) is perfected, encl. (19) application based on grounds as per encl. (18) which contained all those aforesaid irregularities ought therefore to be struck out and summary judgment was thus rightly refused by the Learned SAR.
- b* (please see *Daimler Company Ltd v. Continental Tyre And Rubber Company (Great Britain) Ltd* 1916 2 AC 307 HL, quoted and discussed and adopted by the Federal Court in the case of *Asiah bt. Abdul Manap and Anor v. Capital Insurance Bhd* vide Rayuan Sivil No. 02-11-1996 dated 23 July 1998, whereby decision of the *inferior* court made based on certain procedural irregularities were set-aside).

- c* Lastly, any application under O. 18 r. 19(1) ought to be made promptly even though the said rule does not specify a time frame to do so. In the case of *Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman & Ors* [1987] 2 MLJ 633, Dr Zakaria Yatim J (as he then was) at p. 635 when addressing himself to the aforesaid Order, said the following:
- d*

The rule [i.e. rule 19(1)] does not specify a time limit during which a party may apply to the Court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The Court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial.

- e* The same view was shared and followed by Haidar J (as he then was) in the case of *Jamir Hassan v. Kang Min* [1992] 2 MLJ 46. I cannot find any justifiable reason to disagree with them. Since encl. (19) was not filed in promptly and certainly after it has been set for trial coupled with defective encl. (18), I am left with no alternative but to affirm the Learned SAR’s order and consequentially struck out encl. (27) accordingly.
- f*

- Even if encl. (18) was to be admitted after complying with the requirements of O. 41 r. 4 of the 1980 Rules, which, in the instant case was not, recourse to summary process under O. 18 r. 19 of the same Rules should only be resorted to only in plain and obvious cases and not just because the plaintiff’s case may appear to be weak. In that respect, I find support in the cases of *Pertamina v. Kartika Ratna Thahir & Ors* [1983] 1 MLJ 136, 137, *Oh Thevesa v. Sia Hok Chai* [1992] 1 MLJ 215 and *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, 37.
- g*
- h*

In the *Pertamina’s* case, *supra.*, Sinnathuray J, at p. 137 held that:

- (2) it is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19. It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action.
- i*

(3) so long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak, and not likely to succeed is no ground for striking it out.

a

(Emphasis, underlined).

Order 18 r. 19 of the Rules of the Supreme Court of Singapore is in para materia with O. 18 r. 19 of the 1980 Rules.

b

According to Lim Beng Choon J, in the case of *Oh Thevesa, supra*. “ ... summary procedure under O. 18 r. 19(1)(a) and (b) can only be adopted when it can be clearly seen that a claim or an answer is on the face of it ‘obviously unsustainable’ ”. While fully agreeing with His Lordship’s said view, I would venture further to say that the same principle is equally applicable to application made under r. 19(1)(c) and (d). The words “obviously unsustainable” used by Justice Lim Beng Choon can, in my considered view, be synonymously be equated with the words “ ... only in plain and obvious cases” used by Mr Justice Sinnathuray in the *Pertamina’s* case, *supra*. This principle was later sealed with full endorsement by the then Supreme Court in the case of *Bandar Builder Sdn Bhd* aforesaid.

c**d**

On the premises of all the discussion above, and in conclusion, it can be summarised as follows:

e

- (1). Before deciding to resort to O. 18 r. 19 of the 1980 Rules, the defendant should first decide whether to rely his application on either r. 19(1)(a) or under r. 19(1)(b) and or r. 19(1)(c) and or 19(1)(d), but not the combination of the former with any or more of the latter.
- (2). Should he decide to proceed under r. 19(1)(a), then he must be prepared to rely only on the pleadings and nothing else. This is because by virtue of r. 19(2) of the said Order, no affidavit evidence can be admitted to support encl. (19) application (*New Straits Times (Malaysian) Bhd v. Kumpulan Kertas Niaga Bhd & Anor* [1985] 1 MLJ 226.).
- (3.) Should he decide to proceed under para. (b), (c) and or (d) og r. 19(1), the defendant must make sure that his affidavit in support (in the instant case, encl. (18) must couply with all the fundamental and relevant requirements of O. 41 of the 1980 Rules, both in form and in substance. Any affidavit that does not conform to the aforesaid requirements is liable to be rejected. Without the necessary affidavit in support, any application such as encl. (19) application is bound to be struck out.
- (4). However, if the defendant discovers any defect with his affidavit (encl. (18)), he should then invoke O. 41 r. 4 of the 1980 Rules to obtain the necessary leave from the court to use such affidavit notwithstanding any irregularity in the form thereof.

f**g****h****i**

- a* (5). In deciding to adopt either (2) or (3) above, though r. 19(1) allows the defendant to file his application “at any stage of the proceedings”, it is most prudent for him to do so promptly.
- b* (6). Where the Statement of Claim is being attacked, such application is preferably made before the defence is served (*AG of Duchy of Lancaster v. L & NW Rly* [1892] 3 Ch 274), no doubt it can be made even after the pleadings are closed (per Brett MR in *Tucker v. Collinson* [1886] 34 WR 354), but is normally refused after the action had been set down for trial (*The Bank Bumiputra’s case supra*; and *Jamir Hassan’s case, supra.*).
- c* (7). Lastly, he must be certain that his case is plain and obviously unsustainable and not just merely that the plaintiff’s case is weak or not likely to succeed (*Bandar Builder’s case, supra* and the *Pertamina’s case, supra.*).
- d* From all the relevant facts of encl. (19) application, I held that the defendant was not certain under which paragraph of r. 19(1) of O. 18 was he relying on. The glaring presence of such uncertainty must have prompted the Learned SAR not to sign the summary judgment against the plaintiff. Even that is ignored and assuming the defendant was relying on r. 19(1)(a), then evaluating both the Statement of Claim and the Statement of Defence, there are a number
- e* of issues that should be decided by a full trial. Whether the plaintiff succeed or not, would not have given a justifiable platform for the Learned SAR to entertain the defendant’s encl. (19) application. Furthermore, the said application was filed when the case proper was already set for trial which further enhanced my reason as to why encl. (19) application should have been
- f* refused by the Learned SAR; and rightly so done by him. On the assumption that the said application was based on r. 1(b) and or r. 1(d) of O. 18 aforesaid, it has been demonstrated that encl. (18) was full of defects which made such application irregular that ought to be struck out based on various authorities cited and discussed earlier above. That being so, I therefore affirmed the
- g* learned SAR’s order and struck out encl. (27) appeal accordingly. In doing so, and since I required no submission from both the learned counsels and in all fairness to the defendant, I am of the humble view that he should not be penalised in costs for encl. (27) appeal; and so I ordered.

h

i